No. 14,476

IN THE

United States Court of Appeals

For the Ninth Circuit

DOMINADOR DIMAPILIS AURE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

REPLY BRIEF FOR APPELLEE.

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STATEMENT OF FACTS.

Appellant is a native and national of the Philippine Islands. He enlisted in the United States Navy in the Philippines on April 10, 1946 and at the time of his petition was still serving therein. As a member of the crew of a U.S. Navy vessel he entered the United States in November, 1946 and on many occasions thereafter. *He has never been admitted to the United States for permanent residence.* On August 26, 1953 appellant filed a petition for naturalization pursuant to the provisions of 8 *U.S.C.* 1440(a) (Public Law 86, June 30, 1953, 67 Stat. 108) as a member of the armed forces of the United States. By order dated May 4, 1954 (Tr. p. 12) the Court below denied appellant's petition.

The above facts are admitted.

STATUTES.

8 *U.S.C.A.* 1440a (Public Law 86, 83rd Congress):

"Notwithstanding the provisions of sectio 310(d) and 318 of the Immigration and Natio ality Act, any person, not a citizen, who, aft June 24, 1950, and not later than July 1, 195 has actively served or actively serves, honorabl in the Armed Forces of the United States for period or periods totaling not less than ninet days and who (1) having been lawfully admitte to the United States for permanent residence, ((2) having been lawfully admitted to the Unite States, and having been physically present withi the United States for a single period of at lea one year at the time of entering the Arme Forces, may be naturalized on petition filed n later than December 31, 1955, upon complianc with all of the requirements of the Immigratio and Nationality Act, except that . . .".

8 *U.S.C.A.* 1439 (Immigration and Nationality A of 1952, Sec. 328):

"(a) A person who has served honorably a any time in the armed forces of the United State for a period or periods aggregating three year and, who, if separated from such service, wa never separated except under honorable cond tions, may be naturalized without having reside continuously immediately preceding the date of fi ing such person's petition, in the United State for at least five years, and in the State in whic the petition for naturalization is filed for at lea six months, and without having been physicall present in the United States for any specifie period if such petition is filed while the petitione

is still in the service or within six months after the termination of such service.

EXCEPTIONS

"(b) A person filing a petition under subsection (a) of this section shall comply in all other respects with the requirements of this subchapter, except that . . .

* * * * * * *

RESIDENCE REQUIREMENT

"(d) The petitioner shall comply with the requirements of section 1427(a) of this title, if the termination of such service has been more than six months preceding the date of filing the petition for naturalization, except that such service within five years immediately preceding the date of filing such petition shall be considered as residence and physical presence within the United States."

8 *U.S.C.A.* 1427 (Immigration and Nationality Act of 1952, Sec. 316):

"(a) No person, except as otherwise provided in this title, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totaling at least half of that time, and who has resided within the State in which the petitioner filed the petition for at least six months, (2) has

resided continuously within the United State from the date of the petition up to the time of ad mission to citizenship, and (3) during all of th periods referred to in this subsection has been an still is a person of good moral character, attache to the principles of the Constitution of the Unite States, and well disposed to the good order an happiness of the United States."

8 *U.S.C.A.* 1429 (Immigration and Nationality Ac of 1952, Sec. 318):

"Except as otherwise provided in this title, n person shall be naturalized unless he has beer lawfully admitted to the United States for perma nent residence in accordance with all applicabl provisions of this Act. * * * Notwithstanding th provisions of Section 405(b), and except as pro vided in sections 327 and 328 no person shall b naturalized against whom there is outstanding a final finding of deportability pursuant to a war rant of arrest issued under the provisions of thi or any other Act; and no petition for naturaliza tion shall be finally heard by a naturalizatio court if there is pending against the petitione a deportation proceeding pursuant to a warran of arrest issued under the provisions of this o any other Act: * * *."

QUESTION PRESENTED.

Is appellant eligible for naturalization under th provisions of Title 8 *U.S.C.* 1439?

ARGUMENT.

Appellant concedes that he is *not* eligible for naturalization under Public Law 86, 83rd Congress (8 *U.S.C.* 1440(a)) but seeks to bring himself within 8 *U.S.C.* 1439.

The petition was filed under Public Law 86 but following *Yuen Jung v. Barber,* 184 F. 2d 491 (C.A.-9), if appellant is eligible under any statute the Court should properly apply it. Appellant endeavored to persuade the Court below, Petition for Naturalization of Dominador Dimapilis Aure, No. 105486 that he was eligible under 8 *U.S.C.* 1439. The ruling was against him. The Court said (Tr. p. 12):

> "If petitioner were admitted for permanent residence he would be eligible for naturalization pursuant to any one of three provisions of the Nationality Code facilitating the naturalization of aliens who have served honorably in the armed forces.—Section 1439 . . . Section 1440 . . . and Section 1440(a) (P.L. 86) . . . *But his admission is a prerequisite to his naturalization pursuant to each of these three Code provisions.*" (Emphasis ours.)

And at Tr. p. 13:

> "It is urged that the Congress did not intend that the 1952 Act should change the law in this respect (absence of permanent residence as a requisite under the Nationality Act of 1946, Sec. 324). However, Section 318 of the 1952 Act (8 U.S.C. 1429) declares that except as otherwise provided in the Act, 'no person shall be naturalized unless he has been lawfully admitted to the

> United States for permanent residence'. There is no provision relieving aliens who have served for three years in the armed forces from this requirement. It is true that there is no reference in the legislative history of the 1952 Act to this significant change in the law. Moreover, the House report on the 1952 Act, states that the Act 'carries forward substantially the provisions of existing law' in respect to the naturalization of aliens who serve for three years in the armed forces. House report 1365, 82nd Congress, 1952 U.S. Code Congressional and Administrative News, 1737. While this may raise a doubt as to the Congressional intent to make admission for permanent residence a prerequisite to the naturalization of such aliens, the Court cannot disregard the explicit statutory language." (Language in parentheses ours.)

The language of the statute is explicit. Section 1429 of Title 8 provides, "except as otherwise provided . . . *no person* shall be naturalized *unless* he has been lawfully admitted . . ." (Emphasis ours.)

Section 1439 of Title 8 permits a person *still in* the armed forces or *within six months after* termination to have the benefits of the statute without having resided continuously in the United States for at least five years, and in the State of filing for at least six months, and without having been physically present in the United States for any specified time. If the person has been *out* of the service *more* than six months then he must comply with Section 1427(a) of Title 8 which requires continuous residence *after*

being lawfully admitted and immediately preceding the date of filing. In any event, the requirement of lawful admission for permanent residence specified by Section 1429 *must* be satisfied by a person seeking naturalization under Section 1439, whether he is *still in* the armed forces or *has been out* more than six months. The appellant herein has *not* been lawfully admitted for permanent residence.

It is respectfully submitted that the District Court did not err in denying appellant's petition.

Dated, San Francisco, California,
February 6, 1955.

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